**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 26, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP838-CR** **Cir. Ct. No. 2013CM630**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS D. DOWLING,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Thomas Dowling appeals from a judgment of conviction for disorderly conduct as well as the circuit court's order denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

postconviction motion. Dowling argued his trial counsel performed ineffectively by failing to seek suppression of evidence based on his withdrawal of his wife's consent for police officers to enter their apartment. We conclude the court did not err, and we affirm.

## *Background*

¶2 The State charged Dowling with disorderly conduct, and he moved to suppress evidence police obtained following their entry into his apartment. He contended the police violated his Fourth Amendment rights by entering without a warrant or other lawful basis. The circuit court held an evidentiary hearing, and after finding that Dowling's wife had consented to the officers' entry, denied the motion to suppress. Dowling was later convicted at a jury trial. He subsequently moved for postconviction relief, arguing his trial counsel performed ineffectively by failing to seek suppression of evidence, either before or during trial, based upon testimony presented at the suppression hearing and trial indicating Dowling asked law enforcement to leave his apartment and the officers did not comply. The court denied the motion and Dowling appeals.

¶3 The following relevant evidence was presented at the suppression hearing and subsequent jury trial.

¶4 At the suppression hearing, Officer Dustin Cline, a Village of Grafton police officer, testified that around 10:30 p.m. on October 29, 2013, he was dispatched to Dowling's apartment pursuant to "a 911 call from a neighbor." The caller had reported to dispatch he/she believed there was family trouble or a domestic disturbance occurring and "specifically told [the police] [he/she] heard slamming doors, yelling and screaming." The caller "specifically requested … a welfare check on the wife to make sure she was okay." Cline and Officer Justin

Gehm, also of the Grafton Police Department, knocked on Dowling's apartment door and the door was opened by Dowling's wife and a neighbor different than the one who had called 911.

¶5 Cline and Gehm first spoke with this neighbor who told them Dowling had had "too many … Long Islands" and he was at Dowling's apartment "to try to calm [Dowling] down." Dowling's wife also stated Dowling had had "too many Long Islands," and told the officers he was in the back bedroom. Cline believed the wife allowed the officers to enter the apartment but did not recall if such consent was verbal or nonverbal, but believed she did "step[] out of the way and allow[] us in." The officers told the wife they needed to speak with Dowling in order to perform their investigation in part because "we knew that he was the one causing the disturbance that resulted in a 911 call." The wife stated that "at some point" Dowling "was slamming doors and yelling."

¶6 The officers were just "feet" inside the apartment when Dowling came walking down the hallway toward them. It was "immediately apparent" to Cline that Dowling "was intoxicated just based on his poor balance while he was walking. He was stumbling, he was slurring his words, yelling, swearing." Because they had been called there for a domestic incident, the officers "split up" Dowling and his wife, so they could communicate with each without the other one overhearing what was being said. Cline went with the wife, but overheard Dowling tell Gehm and an Officer Patrick Brock, also of the Grafton Police Department, to "leave" some time after they had started talking with Dowling.

¶7 Gehm testified to being dispatched to Dowling's apartment for "a person yelling," asking Dowling's wife if he could enter the apartment, and the wife nodding her head up and down, which he interpreted as consent to enter.

Gehm entered the apartment, at which point he called out Dowling's name and Dowling "emerged." Gehm was not far into the apartment before contact was made with Dowling, at which point Dowling became "disorderly" with the police.

¶8 The wife testified on Dowling's behalf at the hearing. On direct examination, she denied nodding her head or otherwise indicating to the officers that they could enter the apartment, and on cross-examination by the State, she answered in the affirmative when asked if there was "any yelling or banging of doors" before Dowling went to lay down in bed.

¶9 The circuit court found that the wife did consent to the officers entering the apartment by nodding in the affirmative when Gehm asked her if they could enter. With that, the court concluded the officers' entry was lawful and denied the suppression motion.

¶10 At the jury trial, Brock testified to receiving a 911 call regarding "an intoxicated person … yelling and slamming doors" in apartment three at 769 North Green Bay Road, Dowling's apartment. Once at the apartment, Brock encountered a neighbor who stated he "was trying to calm [Dowling] down because he had been drinking too much." Brock observed Dowling's wife in the apartment, and confirmed based upon her demeanor, which he described in part as "calm," she "appeared not to be the intoxicated person" who was "yelling and slamming doors." The officers indicated they wanted to talk with Dowling "[t]o find out what had been going on inside the residence" that caused a neighbor concern and led to the 911 call.

¶11 Once inside the apartment, Brock was "met by [Dowling] in the hallway between the kitchen and the back bedrooms." When Brock first observed Dowling, Dowling's demeanor was "agitated" and he was yelling. Brock and

Gehm had Dowling "come into the living room [and] sit down." Both officers were telling Dowling to "calm down," but Dowling was yelling "very loudly." Dowling appeared intoxicated, with Brock noticing "a strong odor of intoxicants" and his speech was "very heavily slurred." Dowling continued yelling and was in an "aroused agitated state" during the officers' entire interaction with him. When asked by the State upon redirect examination, "Did you have evidence or facts … when [Dowling] first came out that he was agitated before you got there?" Brock responded, "Just based upon the 911 call saying that the person had been yelling and slamming doors, that [indicated] an agitated person I would say."

¶12 Brock had been to that apartment building before on noise complaints and was aware the walls "are typically thin there." Based on that and Dowling's yelling, Brock believed his yelling could be heard in other apartments. When Dowling refused to calm down, the officers arrested him for disorderly conduct.

¶13 Cline also testified at the trial. He initially learned the following from dispatch:

> [W]e received a 911 call from a tenant in [Dowling's] apartment building in regards to a possible family trouble incident where they said that the male neighbor who lives in Apartment Number 3 was yelling and slamming doors, and they specifically wanted the welfare of the wife that lived there checked on.

At the apartment door, Cline and Gehm encountered a neighbor who stated Dowling had "too many Long Island Iced Teas," was "yelling and out of control," and he (the neighbor) was there to "calm him down and get him to go to bed." The neighbor indicated he was not the neighbor who had called 911. The officers made contact with the wife because "we still weren't sure if the yelling and

slamming of doors was directed at … the wife.… [W]e were there to perform an investigation." The wife was "calm," not agitated or excited, "just talking normally." Cline did not just leave the apartment at that point because

> we're still investigating what's called a family trouble or domestic violence incident. Specifically the neighbor requested that we check on the welfare of the wife. She wasn't the one that was yelling and slamming doors. The neighbor told us it was Mr. Dowling. [The wife] told us it was Mr. Dowling. We had to confirm and make sure there was no domestic violence situation taking place.

¶14 Inside the apartment, Cline observed Dowling walking down the hallway in a "highly intoxicated" state. Cline concluded Dowling was "immediately agitated that we were even there" based upon Dowling's "demeanor, how he spoke. I think he probably told us to leave immediately." Dowling's demeanor did "not at all" alleviate Cline's concerns regarding possible domestic violence, but instead "confirmed the fact that we needed to perform the investigation."

¶15 The officers separated Dowling and his wife within the apartment. Cline spoke with the wife who informed him Dowling "was angry over a situation that happened earlier. He wasn't mad at [the wife], but he was yelling and slamming doors because she just kept reiterating he had too many Long Island Iced Teas, and she said he's not like this when he's not drinking." While talking with the wife, Cline could overhear the encounter between the other officers and Dowling, and he heard Dowling yelling, and the officers telling him to calm down. Cline also heard Dowling tell them to leave. Cline determined the wife was "fine," but testified the officers "were still investigating the yelling and the slamming of doors." Cline indicated Dowling was arrested because of "the totality of everything involved," not just Dowling's interactions with the officers,

and noted, "We received an emergency 911 call from the neighbor." When asked by Dowling's counsel on cross-examination, "So is it your position today that you would have just arrested him anyway?" Cline responded, "We were performing the investigation. His demeanor just sped up the arrest potentially."

¶16 Gehm testified that when he went to Dowling's apartment the wife appeared to be "calm, collected, not crying, not loud, not disruptive, in any fashion," and did not appear to be under the influence of intoxicants. A neighbor at the door with the wife told Gehm he went to Dowling's apartment to try and calm Dowling down because the neighbor had heard some noise.

¶17 As Gehm entered the apartment, he called out for Dowling. A short time later, Dowling began walking down the hallway toward Gehm. Gehm observed "[h]is speech was slurred, and he appeared unsteady on his feet, staggering; and all he said was he had too many Long Island Iced Teas." Dowling did not immediately appear agitated, but became so within a few seconds: "He began to thank us officers and wanted us to leave," but became agitated when they would not leave. At that point, Dowling's voice began to get louder, and he ignored any questions or commands from the officers. Dowling refused the officers' commands "to stop yelling and causing a further disturbance," at which point he was arrested.

¶18 The wife testified that on the night in question Dowling was angry and "a little loud" when they had returned home from a bar. She acknowledged Dowling had been yelling for "[a]bout five minutes," because of an incident at the bar, but she denied Dowling had slammed doors. A neighbor came over to the apartment to try to calm down Dowling, and eventually talked Dowling in to going to sleep. Dowling's wife testified that the "neighbor kept saying the cops are

going to come. He kept telling [Dowling] that the neighbor [across the hallway] called the cops on" Dowling. Officers knocked on the door to her and Dowling's apartment. She answered the door, and they told her there had been a 911 complaint and asked if they could come inside. She gave no response and they entered the apartment. Dowling got out of bed after hearing the knock at the door. The police asked if they could speak with him, to which inquiry Dowling did not respond. Dowling was "very agitated" by the police presence in the apartment. The wife acknowledged Dowling had been intoxicated and that they had neighbors above them, next to them, and across the hall.

¶19 Dowling also testified in his own defense. He acknowledged he was intoxicated at a bar and became upset in relation to how a bouncer had handled him. He acknowledged he was still upset when he went home and was "yelling" loud enough to disturb two neighbors, one of whom called the police and one of whom came over to his apartment and told Dowling he needed to "quiet down." Dowling eventually went to bed and subsequently heard the police knock on the apartment door. Dowling got up and heard the police speaking with the neighbor and Dowling's wife. An officer asked for permission from the wife to enter the apartment and the wife "didn't even get a chance out of her mouth to say no or yes or whatever." The officers "commandeered" his house and started ordering him to do or not do various things, which Dowling found "very agitating" because it was his home. Dowling asked the officers to leave, but they did not comply. He was eventually taken into custody. He acknowledged he was in a "highly intoxicated state" and made inappropriate comments to the officers after being taken into custody.

¶20 As stated, the jury found Dowling guilty, the court denied his subsequent motion for postconviction relief, and he now appeals.

***Discussion***

¶21 At the postconviction hearing, Dowling made it clear through counsel that "we don't dispute in any way the Court's ruling that Ms. Dowling consented to the entry [into the apartment] at the outset of this." Instead, Dowling's postconviction contention is that his trial counsel performed ineffectively in failing to move for suppression of evidence on the basis that police were constitutionally required to depart his apartment as soon as he clearly indicated to them that he wanted them to leave, even though his wife had initially granted them permission to enter. We conclude trial counsel did not perform ineffectively in failing to move for suppression on this basis.

¶22 To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficiency prejudiced him/her. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). If the defendant fails to prove one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶23 To prove deficient performance, a defendant must show that counsel's acts or omissions were "outside the wide range of professionally competent assistance," *see* ***id.*** at 690, and were "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *see* ***State v. Maloney***, 2005 WI 74, ¶24, 281 Wis. 2d 595, 698 N.W.2d 583. The defendant must overcome a strong presumption he/she received adequate assistance and counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *see also* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Significant to this

case, counsel does not perform deficiently in failing to object and "argue a point of law that is unclear." ***State v. Thayer***, 2001 WI App 51, ¶14, 241 Wis. 2d 417, 626 N.W.2d 811. To prove prejudice, a defendant must show the alleged errors of counsel were "of such magnitude that there is a reasonable probability that, absent the error[s], 'the result of the proceeding would have been different.'" ***Erickson***, 227 Wis. 2d at 769 (quoting ***Strickland***, 466 U.S. at 694).

¶24 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous, ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305, but whether counsel's performance was deficient or prejudicial is a question of law we review de novo, ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶25 Dowling asserts trial counsel performed ineffectively in failing to move to suppress evidence on the grounds discussed above because he believes he would have prevailed on such a motion based upon the United States Supreme Court's decision in ***Georgia v. Randolph***, 547 U.S. 103 (2006). We conclude the facts of this case vary too significantly from those in ***Randolph*** for us to hold that trial counsel performed deficiently in failing to bring such a suppression motion.[2]

¶26 We assume, without deciding, that Dowling clearly indicated to the officers that they should leave the apartment. Even though most of the facts

[2] Indeed, we also conclude that such a motion likely would not have succeeded, but because we conclude trial counsel was not deficient in failing to make such a motion, we need not fully analyze whether there would have been a reasonable probability of a different result if trial counsel had brought such a motion. *See* ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583 ("We need not address both [deficiency and prejudice] if the defendant makes an insufficient showing on one.").

indicate Dowling acted in a disorderly manner in the officers' presence *prior* to telling the officers they should leave, we nonetheless assume, again without deciding, that Dowling told them to leave before he began acting disorderly in their presence.

¶27 Because this appeal comes to us under the rubric of ineffective assistance of counsel, we ultimately need not decide whether the police were legally required to immediately depart the apartment upon Dowling telling them to leave, although we seriously doubt they were so required in light of the fact Dowling's wife had consented to their entry and they already had probable cause that Dowling had committed the crime of disorderly conduct—for yelling loudly enough for one neighbor to call the police and another to come over to try to calm Dowling down. And, based on the testimony, it appears it was not more than a matter of moments after the officers entered the apartment before Dowling began his second bout of disorderly conduct, this time in the officers' presence. We need not decide the underlying question of the lawfulness of the officers' continued presence in the apartment because the more narrow question before us is whether trial counsel acted unreasonably in failing to move to suppress evidence in light of ***Randolph***. Because of the significant distinctions between the facts of this case and ***Randolph***, trial counsel did not perform deficiently in failing to bring a suppression motion based upon that case.

¶28 In ***Randolph***, the Supreme Court held that where two occupants of a residence, in that case Randolph and his estranged wife, are present at the residence and one consents to a search of the premises and the other contemporaneously refuses to allow the search, the Fourth Amendment rights of the refusing occupant prevail and the search is unlawful if it proceeds absent other legal justification. ***Id.*** at 120. In that case, however, the officers entered and

*searched* the residence, whereas in this case, the officers entered the apartment just barely beyond its threshold. While one officer did call out Dowling's name, in an apparent hope that Dowling would produce himself, as he did, there is no indication in the record that any of the officers searched the apartment for him or any other evidence. Thus, the police "intrusion" in this case was less significant than in ***Randolph***. ***Id.*** at 112, 118 (noting the legal distinction between an occupant authorizing police to "cross[] the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted" and "authoriz[ing] anyone to rummage through" a bedroom in the house, and also noting the distinction between "when the police may enter without committing a trespass, and when the police may enter to search for evidence").

¶29 In addition, even in light of ***Randolph***, the police entry into and initial presence in the apartment in this case was lawful because the wife's grant of consent for their entry was not accompanied by any contemporaneous objection from Dowling. *See* ***id.*** at 121 (drawing a "line" by stating "*if* a potential defendant with self-interest in objecting *is in fact at the door* and objects, the co-tenant's permission does not suffice for a reasonable search, *whereas* the potential objector, nearby but not invited to take part in the *threshold* colloquoy, loses out." (emphasis added)). Thus, it is unclear that ***Randolph*** required the officers to

immediately depart the apartment once Dowling objected to their presence, even if they had not already had probable cause to arrest him for disorderly conduct.[3]

¶30 Which leads us to the most significant distinction between this case and ***Randolph***. In this case, the officers had probable cause to arrest Dowling for disorderly conduct prior to any request he may have made for them to leave. There is no dispute throughout any of the testimony at either the suppression hearing or at trial, including Dowling's own testimony, that Dowling had been yelling sufficiently loud and for a sufficient length of time that one neighbor called the police and another neighbor came over to Dowling's apartment to try to calm him down. WISCONSIN STAT. § 947.01 provides: "**Disorderly Conduct. (1)** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, *unreasonably loud* or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." (Emphasis added.) The testimony indisputably demonstrated that by the time Dowling asked the police to leave the apartment, the police had probable cause that Dowling was the "male" in apartment three who had been yelling, and had been doing so in an unreasonably loud manner.

[3] Dowling addresses this inside-the-threshold distinction between ***Randolph*** and the present case by citing to our supreme court's decision in ***State v. Wantland***, 2014 WI 58, 355 Wis. 2d 135, 848 N.W.2d 810. ***Wantland*** involved a passenger who asked, "Got a warrant for that?" when an officer who was performing a vehicle search pursuant to the driver's earlier consent began to open a briefcase. ***Id.***, ¶¶9, 12. Our supreme court concluded the search of the briefcase was lawful because the passenger's words and conduct did not unequivocally indicate a withdrawal of consent with regard to the briefcase. ***Id.***, ¶44. ***Wantland*** in no way affects our analysis because, as indicated, in the present case we assume without deciding both that Dowling clearly indicated to the officers that they should leave the apartment and that he did so prior to acting in a disorderly manner in their presence. *See supra* ¶27.

¶31 By contrast, in ***Randolph***, the searching officers did not possess probable cause to arrest the defendant prior to their entry into Randolph's residence.[4] *See* ***Randolph***, 547 U.S. at 118. This distinction presents a very different constitutional picture in that in this case the officers were lawfully in the apartment and had lawful authority to take Dowling into custody upon their initial encounter with him. *See* ***id.*** (stating that when police are "lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause" (citation omitted)). Nothing in ***Randolph***, or any other legal authority presented by Dowling, clearly indicates that the officers acted in an unconstitutional manner by attempting to momentarily communicate with Dowling, perhaps to decide whether or not they should in fact exercise their discretion to arrest him, instead of foregoing such communication and just immediately arresting him for his earlier disorderly conduct.

¶32 Based upon the foregoing, we conclude Dowling's trial counsel did not perform deficiently in failing to move for suppression on the basis Dowling has suggested postconviction because at the time of the suppression hearing and trial the law was not clear that actions such as those by the officers in this case were unconstitutional. "Although it might have been ideal for counsel to ... assert

[4] In ***Randolph***, the consenting, estranged wife told the officers her husband used cocaine; the husband denied this and countered that it was his wife who abused drugs and alcohol. ***Georgia v. Randolph***, 547 U.S. 103, 107 (2006). The wife added the nondescript comment to the officers that there were "items of drug evidence" in the house. ***Id.*** Once in the residence, which was after the wife had consented to the search and Randolph had objected to it, an officer found evidence of illegal drugs. ***Id.*** The ***Randolph*** Court did not suggest, and we cannot conclude based upon these facts, that the officers in ***Randolph*** had probable cause to arrest Randolph for a crime at the time they entered the residence.

an interpretation of [***Randolph***] that would benefit [Dowling], the fact is that [counsel] was not deficient in failing to do so." *See* ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

*By the Court*.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.